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No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 660,
Petitioner,

v.

EDWARD C. HESTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED *

On January 13, 1989 this Court remanded the instant case to the United States Court of Appeals for the Eleventh Circuit "for further consideration in light of *Reed v. United Transportation Union*, 488 U.S. —— (1989)." The questions now presented are:

1. Whether the court of appeals discharged its responsibility under the terms of this Court's remand when the appellate court reconsidered *only* its earlier decision to use federal law to determine the chronological length of the limitations period—and *not* its earlier decision to use federal law to determine the applicable tolling rules—in deciding this § 101(a)(5) of the Labor-Management and Disclosure Act of 1959 suit?

2. Whether under this Court's decision in *Reed v. United Transportation Union, supra*, the federal tolling rules followed in "hybrid" fair representation/§ 301 litigation are applicable to LMRDA suits even though LMRDA litigation is otherwise governed by borrowed state statute of limitations?

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* In addition to the parties named in the caption, the International Union of Operating Engineers, and IUOE Local 320 were defendants in the courts below and are therefore additional respondents herein.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

International Union of Operating Engineers Local 660 ("IUOE Local 660"), defendant in the district court and appellant in the court of appeals, petitions this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Eleventh Circuit to review the judgment in *Hester v. Operating Engineers*, 11th Cir. No. 85-7699 (July 31, 1989).

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court is officially reported at 878 F.2d 1309 and is reprinted in the separate appendix to this *certiorari* petition at pp. 1a-5a (hereinafter "Pet. App."). The opinion of the court of appeals on the first appeal in this case is officially reported at 818 F.2d 1537, and is reprinted at Pet. App. 8a. The opinion of the court of appeals on rehearing during the first appeal in this case is officially reported at 830 F.2d 172, and is reprinted at Pet. App. 49a. The order of this Court vacating the initial judgment of the court of appeals is not yet officially reported, and is reprinted at Pet. App. 57a. The opinion and or-

der of the district court dismissing the complaint is not officially reported, and is reprinted at Pet. App. 58a.

JURISDICTION

The court of appeals opinion on remand from this Court was issued on July 31, 1989. That court entered an order denying IUOE Local 660's timely petition for rehearing and suggesting for rehearing en banc on October 18, 1989. Pet. App. 56a. Justice Kennedy entered an order dated January 9, 1990, extending the time for filing this *certiorari* petition to and including February 6, 1990. Pet. App. 68a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 411(a)(5), provides as follows:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges, (B) given a reasonable time to prepare his defense, (C) afforded a full and fair hearing.

STATEMENT OF THE CASE

Plaintiff Edward Hester, respondent herein, is a member of the International Union of Operating Engineers ("IUOE" or "the International Union") and of IUOE Local 320. In August, 1983, Hester took a job which is not within the jurisdiction of Hester's local union but which, instead, is within the jurisdiction of petitioner IUOE Local 660.

On September 15, 1983, IUOE Local 660 commenced a disciplinary proceeding against Hester for accepting a job within the Local's jurisdiction without obtaining a

clearance card from the Local.[1] After consulting with an attorney, Hester, on October 7, 1983, sent a letter to IUOE Local 660 asserting that "[t]he charges against me are improper under Section 101(a)(5) of the Landrum-Griffin Act because they lack specificity and it is impossible to prepare a defense to such unintelligible charges."

Rather than commencing an action against IUOE Local 660, however, Hester waited until the Local had concluded its disciplinary proceeding and had levied a fine of $3,000, and then elected to pursue an alternative remedy by appealing the Local's action to the General Executive Board of the International Union. On Hester's appeal, the General Executive Board voted to reduce his fine to $500. Hester was notified of the General Executive Board's action by a letter dated August 6, 1984.

On November 7, 1984, more than one year after Hester (and his counsel) had reached their conclusion that IUOE Local 660 was proceeding against Hester in violation of law, Hester commenced this action. Hester's complaint alleged, *inter alia*, that by disciplining him the Local had violated his rights under § 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(5) ("LMRDA").[2]

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[1] Art. XV, Sec. 3(a) of the IUOE Constitution provides, in relevant part, that, "Members of one Local Union shall not seek employment, be employed, or remain at work at the craft within the territorial jurisdiction of another Local Union without the consent of such other Local Union, which consent may be evidenced by its acceptance of the clearance card presented to it by the member involved, as provided in the Constitution, or by the issuance of the service dues receipt hereinafter described."

[2] Hester also sued the International Union for affirming the discipline against him, and Hester sued his own local union, IUOE Local 320, because that Local had honored the fine assessed against Hester

IUOE Local 660 moved to dismiss the complaint as untimely. The district court, *sua sponte*, decided that there was no jurisdiction over Hester's claims and dismissed those claims without reaching the limitations issue. Hester appealed to the Eleventh Circuit.

On appeal, a divided panel of the court of appeals reversed, rejecting both the district court's jurisdictional holding and IUOE Local 660's limitations argument. With respect to the latter issue, that court reasoned as follows.

The court of appeals first concluded that federal law—specifically the six-month statute of limitations period contained in § 10(b) of the Labor Management Relations Act of 1947, 29 U.S.C. § 160(b) ("LMRA")—governs Hester's LMRDA claim. That court was persuaded that the reasoning which had led this Court, in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), to apply § 10(b) to "hybrid" suits alleging a breach of the duty of fair representation and a breach of § 301 of the LMRA, 29 U.S.C. § 185, "require that the section 10(b) six-month limitations period apply to a suit against a union alleging violation of the LMRDA's bill of rights." Pet. App. 18a.

After concluding that federal law supplied the limitations period for LMRDA Title I claims, the court of appeals went on to determine, as a matter of federal law, "when the six-month period began to run." Pet. App. 19a. The panel majority could "find no sufficient reason for applying the substantive rule of limitation from the 'hybrid' suit context without also accepting the rules for when that substantive limitation period begins to run."

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and had informed Hester that he would be suspended from membership until he paid the fine.

In addition to asserting claims under the LMRDA, Hester alleged a breach of the duty of fair representation and a pendent state-law claim.

Pet. App. 23a. And because, under the Eleventh Circuit's decision in *Proudfoot v. Seafarers Union*, 779 F.2d 1558, 1559 (11th Cir. 1986), the § 301 statute of limitations for suing an employer who has breached a collective bargaining agreement is tolled until "the point where the grievance procedure [is] exhausted or otherwise br[eaks] down to the employee's disadvantage," the panel majority was persuaded that in LMRDA cases, the limitations period likewise should be tolled until the internal union appeals procedure is "exhausted or br[eaks] down to the member's disadvantage." Pet. App. 28a. On that basis, the panel majority stated: "the rule announced in *Proudfoot* controls this case." Pet. App. 23a.

Applying the *Proudfoot* rule, the court of appeals readily "conclude[d] that none of [Hester's] federal claims are barred by the statute of limitations" as "Hester filed suit three months" after he "learned of the [International's] final action on his appeal." Pet. App. 28a.

This conclusion drew a lengthy dissent from Judge Tjoflat. The dissent begins from the proposition that because Hester "had concluded" as of October 7, 1983, "that Local 660 was proceeding against him in violation of LMRDA's bill of rights," on that date Hester "had an absolute right to file suit in the district court against Local 660." Pet. App. 39a. As "Hester did not bring suit against Local 660 . . . until . . . well after the six-month statute of limitations had run, Hester's federal claim against Local 660 is . . . time-barred." Pet. App. 41a.

IUOE Local 660 petitioned this Court to issue a writ of *certiorari*. In the Local's initial *certiorari* petition we stated that "the threshold question" was "whether to 'borrow' § 10(b)" as the limitations period for LMRDA claims, Pet. in No. 87-1456 at 9, and that this question had been raised in another earlier-filed *certiorari* petition pending before the Court, *see id.* at 10 n.7. We went

on to argue that, if on considering that question "the Court were to affirm the . . . application of § 10(b) . . ., the tolling question presented here would . . . merit plenary consideration" for reasons we developed at some length. *Id.* at 10 n.7; *see id.* at 11-19.

In the initial petition we then contended that "*if the Court were to hold § 10(b) inapplicable, the instant case would appropriately be remanded to the Eleventh Circuit for reconsideration of the limitations and tolling issues,*" *id.* at 10 n.7, because application of a state statute of limitations " 'logically [would] include[] rules of tolling' " derived from state law as well." *Id.* at 10 n.6 (emphasis added).

Shortly after IUOE Local 660's initial *certiorari* petition in this case was filed, this Court did issue a writ of *certiorari* in *Reed v. United Transportation Union*, 485 U.S. 933 (1988), to decide the LMRDA limitations issue just described. Action on the Local's initial *certiorari* petition was deferred pending the adjudication of *Reed*.

On January 11, 1989, this Court rendered its decision in *Reed* and held that "state general or residual personal injury statutes [of limitations should] be applied to [LMRDA] § 101(a)(2) suits." —— U.S. ——, 57 L.W. 4088, 4090. The *Reed* Court specifically rejected the attempt to analogize LMRDA suits to fair representation actions, concluding that the "argument lacks merit." *Id.* at 4091.

One week after deciding *Reed*, this Court granted IUOE Local 660's initial *certiorari* petition in the instant case, vacated the judgment of the court of appeals, and remanded this case to that court "for further consideration in light of *Reed*." Pet. App. 57a.

On remand, the court of appeals (per Kravitch, J.) held that in LMRDA cases *Reed* provides for the borrowing of a *state* limitations period and that here the ap-

plicable statute is "Alabama's residual personal injury one-year statute of limitations." Pet. App. 3a.[4] As that court recognized, its holding in that regard did "*not* obviate the need to address th[e tolling] issue," as, under Judge Tjoflat's view, Hester had "filed his action . . . more than one year" after his cause of action had accrued. Pet. App. 3a-4a (emphasis added). But with respect to the tolling issue, the court below decided to "adhere to our prior view that we should apply the rule of *Proudfoot v. Seafarers Union, supra,*" Pet. App. 4a, even though *Proudfoot* states a *federal* tolling rule. The panel majority stated that "*Reed* sheds no light" on the "question of when the applicable statute of limitations began to run." Pet. App. 4a. The entire discussion of the tolling point its as follows:

> We adhere to our prior view that we should apply the rule of *Proudfoot v. Seafarers Union*, [*supra*], and remand for the district court to determine when Hester knew or should have known of the Union's final action, *i.e.* the point where the grievance procedure was exhausted or otherwise broke down. [Pet. App. 4a.]

The upshot of the decision below on remand, then, is to apply a *state* statute of limitations—*but a federal tolling rule developed for hybrid § 301/fair representation litigation*—to this case.

REASONS FOR GRANTING THE WRIT

When the instant case was before this Court just one year ago, the Court decided that this case merited the exercise of its *certiorari* jurisdiction so that the Eleventh

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[3] The court of appeals recognized that *Reed* "involved a claim arising under . . . the . . . free speech and assembly provision" of the LMRDA, 29 U.S.C. § 411(a)(2), whereas "Hester's claim arises under 29 U.S.C. § 411(a)(5), the 'Safeguards against improper disciplinary action' provision of the [LMRDA]." Pet. App. 3a. That court stated, however, that "we find no reason to distinguish between claims brought under these two provisions." *Id.* We do not contest that ruling for present purposes.

Circuit would be afforded the opportunity to bring its first decision herein into conformity with this Court's ruling in *Reed v. United Transportation Union*, —— U.S. ——, 57 L.W. 4088 (Jan. 11, 1989).

The court of appeals discharged *only part* of its responsibility on remand. That court did reconsider its decision to use federal law to decide the chronological length of the limitations period. But the court below failed to reconsider its decision to use federal law to determine the applicable tolling rules. The court of appeals instead proceeded on the theory that "*Reed* sheds no light" on the critical open issue the court below was to reconsider, and then proceeded to render a decision that cannot be reconciled with *Reed*.

Under these circumstances, we submit that this Court should, in order to vindicate its supervisory authority over the courts of appeals, grant this *certiorari* petition, summarily reverse the decision below, and remand for a redetermination of the tolling issue in a manner consistent with the principles established in *Reed* and in the line of cases stemming from *Johnson v. Railway Employees Agency*, 421 U.S. 454 (1975).

A. In *Reed*, as already noted, this Court ruled that *state law* is the source of the limitations period for a claim brought under LMDRA § 101(a)(2). The Court reached this conclusion by applying the "general" and "well-established rule that statutes of limitations for federal causes of action not supplied with their own limitations period will be borrowed from state law." 57 L.W. at 4090, 4092.

The Court began its analysis in *Reed* by setting forth this "norm," *id.* at 4089,[4] and then framed the question

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[4] *See* 57 L.W. at 4089:

> Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action. When that occurs, "[w]e have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law."

for decision as whether LMRDA § 101(a)(2) cases "fall[] within . . . the general rule that we borrow an analogous state statute" or within the "closely circumscribed" and "narrow exception requiring application of a federal statute of limitations," *id.* at 4090. *Reed* ultimately concludes that the resolution of this question is "not . . . a difficult task, given a proper understanding of the narrow scope of the . . . exception to our standard borrowing rule," *id.* Indeed, the Court found that it was "*bound* to borrow state personal injury statutes absent some compelling demonstration"—which was found lacking—that 'the federal policies at stake' in § 101(a)(2) actions make a federal limitations period 'a significantly more appropriate vehicle for interstitial lawmaking." *Id.* at 4090-92 (emphasis added).

The *Reed* Court then summarized its analysis, and its holding, as follows:

> Because § 101(a)(2) of the LMRDA is modeled on the First Amendment to our Constitution, there is an analogy between § 101(a)(2) claims, § [42 U.S.C.] § 1983 claims, and state personal injury actions. . . . *The well-established rule that statutes of limitations for federal causes of action not supplied with their own limitations period will be borrowed from state law thus requires that state general or residual personal injury statutes be applied to § 101(a)(2)* suits. None of the exceptions to that rule apply, for § 10(b) of the [LMRA] does not supply a more analogous statute; its six-month limitations period is not better suited to the practicalities of § 101(a)(2) litigation; and it was not designed to accommodate federal policies similar to those implicated in § 101(a)(2) actions. [57 L.W. at 4092; emphasis added.]

B. Although the precise issue in *Reed* involved the length of the limitations period, the principle announced in that case is not so limited. As we have just shown, *Reed* establishes the general principle that LMRDA limitations questions are to be resolved based on this Court's

"standard borrowing rule." 57 L.W. at 4090. And, it is well-settled in this Court's jurisprudence that this "standard borrowing rule" requires that both "the length of the limitations period, *and closely related questions of tolling and application*, are to be governed by state law." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985) (emphasis added).

The proposition that the "limitations borrowing rule" encompasses state tolling rules was, in fact, first established by this Court fifteen years ago in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). The *Johnson* Court held a claim brought under 42 U.S.C. § 1981 untimely as the claim was filed outside of the applicable state limitations period, and there was no state tolling rule which would justify the delay. The Court explained why the state's tolling rules were controlling:

> Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival and questions of application. In borrowing a state period of limitations for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim. [421 U.S. at 463-64.]

Johnson's holding was reaffirmed in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). Quoting the passage from *Johnson* reprinted above, the *Tomanio* Court observed that the borrowing of state limitations period

"logically include[s]" the state's "coordinate tolling rules," *id.* at 484-85, and the Court there found a 42 U.S.C. § 1983 claim untimely by applying New York limitations and tolling law.

Johnson was quoted in full, and reaffirmed again three years later in *Chardon v. Fumero Soto*, 462 U.S. 650 (1983); there the Court found a § 1983 claim to be timely by affording the plaintiffs the benefit of a tolling rule borrowed from state law.

And just last Term, in a decision rendered only four months after *Reed*, the Court once again followed *Johnson* and resolved a timeliness issue by borrowing a state statute of limitations and state tolling rule. *See Hardin v. Straub*, —— U.S. ——, 57 L.W. 4554, 4555 (May 27, 1989):

> "In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival and questions of application." *Johnson v. Railway Express Agency*, [*supra*]. Courts should not unravel state limitations rules unless their full application could defeat the goals of the federal statute at issue.

C. The court of appeals could not have been more wrong than in asserting that "*Reed* sheds no light" on the tolling issue decided below. Pet. App. 4a. That assertion fails entirely to do business with the principle announced in *Reed*. As we have seen, to the extent *Reed* requires borrowing of a state limitations period, this Court's decision *necessarily requires borrowing of state tolling rules as well.*

Thus, contrary to the court of appeals major premise, by applying the "usual borrowing rule" *Reed* casts the strongest possible illumination on the *source* of the tolling rules to be applied in LMRDA Title I cases and in so doing requires resort to state law.

It follows that when this case was remanded for reconsideration in light of *Reed*, it was incumbent upon the

court below to reconsider not only the source of the applicable limitations period but also the source of the applicable tolling rules. By continuing to "adhere to [its] prior view"—and by applying its *federal* tolling rule formulated in *Proudfoot*, *supra*, to this case—the court of appeals failed to discharge its responsibility under the remand and rendered a decision that is no more consistent with *Reed* than its initial decision to apply a federal limitations period.

In sum, the very same considerations which led this Court to grant the initial *certiorari* petition in this case and to vacate and remand the initial decision herein to the court below still obtain and require a second grant of *certiorari* and a second remand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision below should be vacated and remanded for further consideration in light of *Reed v. Transportation Union* and also *Hardin v. Straub*.

Respectfully submitted,

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